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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1161

THE TIMES-MIRROR COMPANY, A CORPORATION; NORMAN CHANDLER, R. F. MARX, J. J. COHEN, AND A. A. KURZE, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The circuit court of appeals wrote no opinion on the present contempt application. The decree of the circuit court of appeals in the preceding review and enforcement proceeding was entered on June 14, 1944, on mandate from this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, which reversed the decision of the circuit court of appeals reported in 136 F. 2d 608. The decision of the National Labor Relations Board upon which the review

and enforcement proceeding was based is reported in 39 N. L. R. B. 1245. The decisions of the Board in the prior representation proceeding are reported in 28 N. L. R. B. 1006, 33 N. L. R. B. 941, 36 N. L. R. B. 285.[1]

JURISDICTION

The decree of the circuit court of appeals, adjudging petitioners herein in contempt and ordering them to take specified action in purgation of their contemptuous conduct, was entered on March 10, 1947. The petition for a writ of certiorari was filed on March 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, on a motion for judgment on the pleadings or for summary judgment, the circuit court of appeals may enter an order adjudicating in contempt without making findings of fact.

2. Whether the circuit court of appeals may enter judgment upon the pleadings or summary

[1] This Court, by order dated March 15, 1947, permitted petitioners to dispense with the printing of the record for the purpose of the consideration of the application for a writ of certiorari. References to the documents comprising the record are designated as follows: Board petition for adjudication in contempt (BP. —); the Answer to the Board's petition (A. —); Board's motion for judgment on the pleadings (JP. —).

judgment in a contempt case when the admissions in the answer and those allegations in the petition not specifically denied, admitted, or met by affirmative defense are sufficient to disclose that respondents have disobeyed, violated and refused to comply with the court's decree.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix, *infra*, p. 17.

STATEMENT

On March 30, 1942, the Board, in a proceeding initiated by charges filed by Los Angeles Newsboys Local Industrial Union No. 75, C. I. O., issued its decision and order (39 N. L. R. B. 1245) finding that Times-Mirror Company, a corporation, had refused to bargain with the Union in violation of Section 8 (5) of the Act.[2] The Board ordered the Company and its officers, agents, and assigns to cease and desist from refusing to bargain with the Union and to bargain with the Union, upon request, as collective bargaining representative of the newsboys within a prescribed unit (39 N. L. R. B. 1245, 1254–1255). Thereafter, upon the

[2] This case followed representation proceedings which were initiated by the Union on March 21, 1940, and culminated in the certification of the Union as exclusive bargaining representative on July 30, 1941 (28 N. L. R. B. 1006, 33 N. L. R. B. 941, 946).

Company's petition for review and the Board's petition for enforcement, the Circuit Court of Appeals for the Ninth Circuit set aside the Board's order, 136 F. 2d 608. Upon petition of the Board, the case was brought before this Court, which announced its decision on April 24, 1944 (322 U. S. 111), reversing the lower court.[3] The lower court on June 14, 1944, entered its decree on mandate enforcing the Board's order in full.[4]

On September 10, 1946, the Board filed its petition with the circuit court of appeals, alleging that the Company and certain of its officers and agents had failed and refused to comply with and had disobeyed paragraphs 1 (a) and 2 (a) of the court's decree in that they had not bargained with the Union in good faith (BP. 4–20).[5] The petition prayed that the court adjudge the Company,

[3] Rehearing was denied on May 22, 1944 (322 U. S. 769).

[4] This case concerns merely one of the companies involved in *National Labor Relations Board* v. *Hearst Publications, et al.*, 322 U. S. 111. The publishers of the other three newspapers, in sharp contrast with petitioners herein, have honored the court's decree by bargaining collectively in good faith with the Union, and their negotiations culminated in written contracts with the Union (BP. 127–135, 234–245; A. 9, 93, 130, 105).

[5] Paragraph 1 (a) provides that the Company, its officers, agents and assigns shall cease and desist from refusing to bargain collectively with the Union as the exclusive bargaining representative of its newsboys within a prescribed unit. Paragraph 2 (a) requires the Company, its officers, agents, and assigns, upon request, to bargain collectively with the Union as the exclusive representative of the newsboys within the unit.

Norman Chandler, its president, R. F. Marx, its circulation manager, Jerry Cohen, its supervisor of street sales, and A. A. Kurze, its city circulation manager, to be in contempt, and order them to take action to make the decree effective (BP. 20–24).[6] On January 13, 1947, the court issued a rule directed to the Company and the named individuals to appear before the court on February 14, 1947, to show cause why they should not be adjudged in contempt and requiring them to file a response to the petition on or before February 3, 1947. After receipt of their answer, it appearing to the Board that the Company and individuals had admitted in substance the commission of sufficient of the acts complained about to support a finding of lack of good faith, the Board filed and served a motion for adjudication in contempt on the pleadings, wherein it indexed the admissions contained in the answer and those allegations of the petition which the Company and individuals had failed to admit, deny, or meet by affirmative defense (JP. 1–8).

A comparison of the Board's petition and the answer thereto shows that, although the answer in a number of instances denies allegations of ultimate fact, it admits the genuineness of documentary evidence supporting the allegations (JP. 2–3); it seeks to evade other allegations of the petition by failing to allude to them, even though

[6] Marx, Cohen, and Kurze represented the Company in meetings with the Union's bargaining representatives.

the order to show cause called for a responsive pleading (JP. 3–6); and it admits that the Company on April 7, 1946, unilaterally, without consultation with, or notification to, the Union, increased the rate of commission of the newsboys selling the Times on Sunday morning from 2½ cents to 4 cents per paper—this notwithstanding that the Company had professed unwillingness to maintain even the *status quo* as to wage rates, demanding a reduction in rates in conferences with the Union (BP. 8–9; A. 18–19, 130, 156, 170, 173).

The answer admits the genuineness of exhibits B–1 to B–38 (BP. 63–157; JP. 2), and C–1 to C–39 (BP. 203–269; JP. 2–3) attached to and made part of the Board's petition. Standing alone, these exhibits, consisting of correspondence between the Union and petitioners and other documentary evidence exchanged by the parties such as proposed contracts, prove that petitioners failed to bargain in good faith as required by the decree, and instead chose to flout the decree by engaging, not in actual, but in pretended bargaining of a most transparent nature, in that petitioners: (a) engaged in dilatory and evasive behavior in, and with reference to, negotiations with the Union;[7] (b) refused to meet with chosen rep-

[7] Example:

1. The petitioners on July 20, 1944, first suggested the possibility of the Union negotiating with the Company and other Los Angeles publishers jointly (BP. 63; A. 55, 83),

resentatives of the Union (BP. 88–90; A. 6, 59, 87); (c) failed to make full and complete counterproposals when requested by the Union to do so;* (d) made, offered, and insisted upon unreasonable

and then after the Union had spent almost 6 weeks attempting to arrange joint conferences the petitioners advised that they believed joint conferences "to be unauthorized" (BP. 66–67; A. 56, 83).

2. On September 23, 1944, the Union asked the petitioners to initiate bargaining negotiations on September 29, 1944 (BP. 72; A. 57, 83). On October 6, 1944, petitioners replied that they were prepared to bargain (BP. 87–88, A. 58, 83, 87). The first meeting of the bargaining committees took place on October 9, 1944, but the Company's committee refused to negotiate with the Union Committee because it had among its members persons who were not newsboys (BP. 88–90; A. 6, 59, 87). When the Union acceded to the petitioners' demands concerning the make-up of the Union Committee, the Company's Committee refused to negotiate because Company's Counsel was out of town and later because one of three of the Company's Committee was allegedly "unavailable" (BP. 91–93; A. 7, 60, 88).

3. Telephone calls made by the Union to petitioner Marx on December 11, 14, 15, 16, and 18, 1944, in an attempt to set a date for the initiation of bargaining negotiations, were not returned (BP. 93–94; A. 7, 60, 88).

4. The first meeting of the bargaining Committees at which negotiations were begun was held on December 28, 1944 (A. 61) more than 5 months after the Union had first requested bargaining pursuant to the decree (BP. 61; A. 55, 83).

* The Union asked for counterproposals on February 21, 1945 (BP. 97–98; A. 63, 89, 90). On March 21, 1945, the petitioners submitted a re-write of the Union's proposals (BP. 99–112; A. 7, 8, 64, 91). On April 9, petitioners submitted a document termed "Tentative Draft of Portions of Contract" which was described as "incomplete" in a covering letter (BP. 112–127; A. 8, 65, 130).

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and unacceptable proposals contrary to the Company's current policies and practices with the intention and purpose of placing the odium of rupture in negotiations upon the Union;[9] (e) refused, although repeatedly requested by the Union, to sign a written agreement embodying the Company's current practices and policies in reference to rates of pay, wages, hours, and working conditions (BP. 250–262; A. 11, 46, 47, 108, 109).

The Board's petition was served upon petitioners before September 10, 1946, and was brought before the court by motion on that date, at which time petitioners were represented by counsel. The court's order to show cause was not issued until January 13, 1947, and the petitioners were given until February 3, 1947, to file their answer; thus, petitioners were in possession of the Board's petition for about five months before answer was required of them. The Board's motion for adjudication on the pleadings or for summary judgment, which invited a response from

[9] In its "Tentative Draft of Portions of Contract," submitted to the Union on April 9, 1945, the Company proposed to reduce the rate of commission to newsboys selling its newspaper on the night side from 3½¢ to 2¢ per paper; this notwithstanding the 3½¢ rate had been in existence for about 8 years. Although an impasse was reached on this proposal, the Company never put the proposed reduced rate into operation, but continued to insist on such a reduction in discussions of rates with the Union (BP. 8–9, 223–224; A. 130, 156, 170, 173). Cf. the unilateral wage increase granted by the Company on April 7, 1946 (BP. 8–9; A. 18–19, 130, 156, 170, 173).

petitioners, was served and filed February 9, 1947, and made returnable simultaneously with the order to show cause on February 14, 1947. Oral argument was had on the return date and the court questioned petitioners' counsel at length. Upon request of petitioners' counsel, the court granted him 10 days after the oral argument to file a brief on the merits and a response to the Board's motion for adjudication on the pleadings. Thus, petitioners were given every opporunity to present such defenses as they had available to them. It was not until all these procedural steps had been followed and the court was fully advised in the premises, that it issued its order adjudging petitioners in contempt.

The contempt order of March 10, 1947, adjudges petitioners in contempt for having failed to comply with the court's decree, and orders, adjudges, and decrees that petitioners purge themselves by: (A) bargaining with the Union in good faith, (B) the Company being represented in negotiations with the Union by its president personally or a person specifically vested by the Company to bind it in the negotiations; (C) offering within 7 days to enter into a written agreement with the Union embodying the Company's present practices and policies in reference to rates of pay, wages, hours and working conditions of its employees in the bargaining unit; (D) posting in the Company's plant and offices a

notice to its employees that it will comply with the contempt order; and (E) filing sworn statements with the clerk of the court at stated periods showing action taken to comply with the order. The decree subjects the individuals to attachment and confinement should they fail to purge themselves as directed.

After issuance of the decree, finding and adjudging the Company and individuals to be in contempt, the circuit court of appeals denied their petition for a stay of execution and enforcement of the contempt order. Thereafter, this Court entered a stay of execution and enforcement of the order of the circuit court of appeals upon condition that on or before March 28, 1947, the Company and individuals file a petition for a writ of certiorari, and a bond in the amount of $5,000.

ARGUMENT

1. The first contention urged by petitioners is that the circuit court of appeals erred in failing to make findings of fact in support of its contempt order. Contempt cases being *sui generis* in character, procedures applicable to them are not prescribed but are left to the sound discretion of the court. In the absence of any statutory requirement making it mandatory, it would appear that a court is not required to make findings of fact in a case where the court is convinced beyond doubt that its decree has been violated.

Only two federal court cases have been found where this contention has been at issue. *Aerovox Corp.* v. *Concourse Electric Co.*, 90 F. 2d 615 (C C. A. 2); *Ryals* v. *United States*, 69 F. 2d 946 (C. C. A. 5). In both of these cases, the courts stated that while it is good practice to recite the facts found as constituting contempt, the recital is not indispensable, and the failure to make such findings is not fatal. 90 F. 2d at 616; 69 F. 2d at 948.

The Board takes the position as a matter of law that the failure of the circuit court to make findings of fact in the instant case was not error, and that the adjudication in contempt was proper. Since the contempt adjudication was here made on a motion for judgment on the pleadings or for summary judgment, this conclusion is supported by analogy to the approved practice with reference to findings on motions for judgment generally. Under the Federal Rules of Civil Procedure, most courts have ruled that findings are not necessary, and the Advisory Committee on Rules for Civil Procedure now proposes to remove all doubt and to add to Rule 52 this specific provision: "Findings of fact and conclusions of law are unnecessary on a decision of a motion under Rules 12 and 56 * * *". *Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States* (May 1945) pp. 59,

60–61.[10] When facts sufficient to establish the contempt are either admitted or not denied by an answer which is required to be responsive, findings of those facts would seem to be superfluous.

2. Petitioners' second contention is that the court is without power to enter a judgment on the pleadings in a contempt case when the answer does not admit all the allegations of the petition. This contention is, we submit, contrary to established legal procedure.[11]

Where the court is convinced that the admitted facts prove the gravamen of the petition, any argument that the court must hold a hearing on other controverted issues not indispensable to determination of the ultimate charge is repugnant to the equitable and orderly processes of judicial proceedings. *Reliance Mfg. Co.* v. *National Labor Relations Board,* 143 F. 2d 761, 762–763 (on contempt) (C. C. A. 7).

The courts have uniformly found a failure to bargain in good faith, where an employer: (1) uses dilatory, evasive and obstructive tactics in

[10] Rule 12 covers motions for judgment on the pleadings and Rule 56, motions for summary judgment.

[11] Petitioners' contention, if carried to its ultimate, would prevent a court from entering judgment on the pleadings in an action for damages in which, for example, a defendant admits that he was under the influence of liquor at the time of the accident, was driving at excessive speed, and inflicted injury upon the plaintiff as alleged in the complaint, but denies operating his automobile in a negligent manner.

collective bargaining negotiations;[12] (2) fails to submit complete counterproposals;[13] (3) refuses to agree to a contract embodying current working conditions;[14] (4) refuses to bargain with

[12] *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 686 (C. C. A. 9); *National Labor Relations Board* v. *Ellis-Klatscher Co.*, 142 F. 2d 356, 358–359 (C. C. A. 9); *National Labor Relations Board* v. *Martin Bros. Box Co.*, 130 F. 2d 202, 206–208 (C. C. A. 7), certiorari denied, 317 U. S. 660; *National Labor Relations Board* v. *Dixie Motor Coach Corp.*, 128 F. 2d 201, 202 (C. C. A. 5); *M. H. Ritzwoller* v. *National Labor Relations Board*, 114 F. 2d 432, 436 (C. C. A. 7).

[13] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 883 (C. C. A. 1), certiorari denied, 313 U. S. 595; *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748 (C. C. A. 7), certiorari denied, 313 U. S. 565; *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 137 (C. C. A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Boss Mfg. Co.*, 118 F. 2d 187 (C. C. A. 7) (on contempt); *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 687 (C. C. A. 9); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (C. C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 640 (C. C. A. 4); *National Labor Relations Board* v. *H. G. Hill Stores, Inc.*, 140 F. 2d 924, 926, 927 (C. C. A. 5); *M. H. Ritzwoller* v. *National Labor Relations Board*, 114 F. 2d 432, 436 (C. C. A. 7); *Inland Lime & Stone Co.* v. *National Labor Relations Board*, 119 F. 2d 20, 22 (C. C. A. 7); *Wilson & Co.* v. *National Labor Relations Board*, 115 F. 2d 759 (C. C. A. 8).

[14] *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. 2d 875, 882–883 (C. C. A. 6) (on contempt); and see *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 685, 686 (C. C. A. 9); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 637 (C. C. A. 4); *National Labor Relations Board* v. *Express*

representatives of the Union's choosing.[15] Each of these indicia of lack of good faith bargaining is glaringly apparent from a reading of the admitted documentary evidence (BP. 63–157, JP. 2; BP. 203–269, JP. 2–3). In addition, petitioners admit that the Company initiated unilateral wage increases on April 7, 1946, without consultation with or notification to the duly certified collective bargaining representative—an action which evidences wilful and definite contempt for the whole plan of collective bargaining (BP. 8–9; A. 18–19, 130, 156, 170, 173). *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 383, 384. Thus, the congeries of admitted facts reveal a compendium of virtually every element of bad faith in the discharge of a bargaining obligation defined by the cases. Indulgence in such bad faith bargaining in the face of an outstanding decree of a federal court represents an extreme degree of contumacy.

Publishing Co., 111 F. 2d 588, 589 (C. C. A. 5), affirmed on this point, 312 U. S. 426; *National Labor Relations Board* v. *Swift & Co.*, 127 F. 2d 30, 31 (C. C. A. 6); *National Labor Relations Board* v. *Boss Mfg. Co.*, 118 F. 2d 187, 189 (C. C. A. 7); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 136 (C. C. A. 7), certiorari denied, 313 U. S. 595.

[15] *National Labor Relations Board* v. *Blanton Co.*, 121 F. 2d 564, 567, 571 (C. C. A. 8); and see Section 7 of the National Labor Relations Act (29 U. S. C. 157).

The circuit court of appeals had full authority to determine whether the facts not denied by the pleadings were sufficient to show that petitioners had engaged in a mere superficial pretense of bargaining, and that the negotiations were captious and accompanied by an active purpose and intent to defeat or obstruct real bargaining. Cf. *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. 2d 131, 134, certiorari denied, 313 U. S. 595. "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." *Virginia Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 550; *Singer Mfg. Co.* v. *National Labor Relations Board, supra.*

Rule 56 of the Rules of Civil Procedure for the District Courts of the United States deals with summary judgments in federal district court practice. By Rule 56 (a), summary judgment is made available to a claimant.[16] Under this rule, summary judgment may properly issue where the truth is clear,[17] and upon the entire

[16] The rule reads: "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

[17] *Port of Palm Beach Dist.* v. *Goethals,* 104 F. 2d 706 (C. C. A. 5).

record in the case the court is able to say that the trial of the action "will be a useless form."[18]

Certainly, a circuit court of appeals exercising original jurisdiction in a *sui generis* proceeding such as contempt should be no more restricted than is a district court in an action before it.

CONCLUSION

The order of the court below, finding petitioners in contempt of the court's decree, is correct. There is no conflict in the decisions nor any question warranting review. The petition should, therefore, be denied.

Respectfully submitted,

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MAY 1947

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[18] *Saunders* v. *Higgins*, 29 F. Supp. 326 (S. D. N. Y.).

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * *
>
> SEC. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

U. S. GOVERNMENT PRINTING OFFICE: 1947